UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

PETER BLASI, JR., *et al.*, Plaintiffs, v. UNITED DEBT SERVICES, LLC, *et al.*, Defendants.	Case No. 2:14-cv-00083-GCS-TPK Judge George C. Smith Magistrate Judge Terence P. Kemp

NAME SEEKER, INC.'S APPLICATION FOR ATTORNEYS' FEES AND COSTS AS DISCOVERY SANCTIONS AGAINST AMG LEAD SOURCE AND ITS COUNSEL

Pursuant to the Court's order of February 21, 2017 (Dkt. 213, "Order"), defendant/cross-plaintiff Name Seeker, Inc. ("Name Seeker") respectfully submits the following application for attorneys' fees and costs as discovery sanctions against defendant/counter-defendant AMG Lead Source ("AMG") and its legal counsel, Brian Melber of Personius Melber LLP ("Mr. Melber"). For all the reasons discussed below, Name Seeker requests that AMG and Mr. Melber be held jointly and severally liable for the award, and that the fees and costs itemized below be awarded in full.

I. Introduction

As the Court aptly noted, "[i]t is probably an understatement to say that things did not go as planned" when it came to obtaining discovery from AMG in this case. (Dkt. 213 at 2.) Indeed, simply getting AMG to respond in writing to Name Seeker's discovery requests was (and still is) an arduous task for Name Seeker. And when AMG finally did respond, it took considerably more time and effort—*i.e.*, many months of negotiations, correspondence, discovery conferences, and court orders—to get AMG to finally produce any responsive materials, only for Name Seeker to ultimately learn that what little had been produced was virtually worthless while the truly relevant (and likely exculpatory for Name Seeker) evidence it had sought all along was intentionally destroyed by AMG. All this culminated in a lengthy spoliation motion which AMG ultimately elected not to oppose the night before its response was due and on the eve of a hearing that would have exposed the full extent of AMG's fraud. AMG's actions also derailed the entire case, causing Name Seeker to repeatedly postpone depositions, participate in court conferences, negotiate and amend scheduling deadlines, and ultimately stay all discovery. To make matters worse, AMG's blatant defiance of this Court's orders and willful destruction of evidence happened on Mr. Melber's watch. In fact, it is undisputed that AMG not only intentionally destroyed evidence during the pendency of this litigation but also that it happened *while said evidence was to be in Mr. Melber's possession and one day after the Court specifically ordered that it be preserved by Mr. Melber.* (*See* Dkt. 190 at 2, 5-6; Dkt. 175 at ¶ 4; Dkt. 213 at 2.)

All told, AMG's deliberate and unlawful actions—and Mr. Melber's inattentiveness to or his complicity in those actions, or both—have turned what should have been a relatively simple matter of obtaining discovery from an adverse party into a time consuming and expensive nightmare for Name Seeker. In fact, Name Seeker incurred attorneys' fees totaling $136,503.00 and costs totaling $19,863.22, for a grand total of $156,366.22, just in seeking discovery and sanctions from AMG alone. (*See* Heeringa Decl., Ex. A, at ¶¶ 3, 12-14, 16; Ex B at 9.)[1] As shown below, these amounts represent reasonable attorneys' fees and costs that were incurred by Name Seeker as a direct result of AMG's egregious discovery misconduct and Mr. Melber's carelessness. Thus, the Court should award Name these fees and costs in their entirety, and order that Mr. Melber share in AMG's obligation to pay them.

II. Summary of Argument

Name Seeker's counsel has expended a significant amount of time addressing AMG's discovery abuses in this case over the course of the past year—time for which Name Seeker has paid a

[1] All "Ex." citations refer to exhibits filed contemporaneously with this brief unless otherwise noted.

considerable sum. The Court should therefore grant Name Seeker's application, award Name Seeker its fees and costs in full, and hold Mr. Melber jointly responsible for them for several reasons:

First, the time spent by Name Seeker's counsel was necessary—and thus reasonable under applicable law—in order to obtain discovery from an obstructionist AMG and to address AMG's spoliation, and the particularized billing record summaries submitted in support of this application (*see* Exs. B & C)[2] show the extensive work performed in uncovering and combatting AMG's misdeeds.

Second, the hourly rate billed by Name Seeker's counsel in this case is likewise reasonable under applicable law given, *inter alia*, the relevant prevailing market rates, counsel's skill and experience, the tremendous amount of labor required, and awards issued in similar cases.

Third, the costs expended by Name Seeker are directly related to obtaining discovery and sanctions from AMG (specifically, witness fees and research charges) and are reasonable.

Fourth, under similar circumstances, this Court has ordered parties and their counsel to pay sanctions where counsel failed to ensure that relevant electronic evidence was preserved by the client during litigation. *See*, *e.g.*, *Brown v. Tellermate Holdings Ltd.*, No. 2:11-CV-1122, 2014 WL 2987051, at *19-21, 26 (S.D. Ohio July 1, 2014), *adopted as modified*, 2015 WL 4742686 (S.D. Ohio Aug. 11, 2015). In this regard, even if Mr. Melber had no direct knowledge of his clients' willful destruction of evidence, his failure to meet his discovery obligations and prevent said destruction alone justifies holding him jointly and severally responsible for paying the sanctions awarded to Name Seeker.

III. Legal Standard

The Sixth Circuit has adopted the "lodestar" method for determining the reasonableness of attorney fees awards. *See Bldg. Svc. Local 47 Cleaning Contractors Pension Plan v. Grandview*

[2] Detailed summaries of the relevant time records by Name Seeker's counsel have been provided for the Court's review. Name Seeker will submit unedited billings records for *in camera* inspection upon request. Name Seeker's lead counsel was at another law firm from February to June 2016 and, although AMG's discovery abuses started in February 2016 when Name Seeker first sought and AMG refused to respond to discovery, Name Seeker submits this application only as to the fees and costs incurred by Name Seeker starting in June 2016. (*See* Exs. B & C.)

Raceway, 46 F.3d 1392, 1401 (6th Cir. 1995). Applying this method, district courts must determine the amount of attorney hours "reasonably expended … multiplied by a reasonable hourly rate." *Id.*(citation omitted). "There is a "strong presumption" that this lodestar figure is a reasonable fee. *Id.* (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986)).

In addition, "[t]here remain other considerations that may lead the district court to adjust the fee upward or downward." *Id.* at 1402 (citation omitted). Such "other considerations" include::

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Barnes v. City of Cincinnati, 401 F.3d 729, 745-46 (6th Cir. 2005) (quoting *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989)) (approving upward adjustment of 175% to fees). In other words, this Court may, "within limits, adjust the 'lodestar' to reflect relevant considerations peculiar to the subject litigation." *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000) (citation omitted).

The Court does not need to conduct an evidentiary hearing before awarding fees as sanctions under Rule 37. *See J.P.Morgan Chase Bank, N.A. v. Neovi*, Inc., No. 2:06-CV-0095, 2007 WL 1875928, at *6 (S.D. Ohio June 20, 2007). Instead, fee awards may be granted where "the parties have had the opportunity to submit briefs and affidavits to the court." *Id.* (citation omitted). And no particular form of proof is required either. *See Granada Investments*, *Inc. v. DWG Corp.*, 962 F.2d 1203, 1208 (6th Cir. 1992) (citing *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983)). "All that is necessary is evidence supporting the hours worked and rates claimed." *Id.* Counsel's billing records are usually enough to constitute proper evidence "even if the description for each entry [is] not explicitly detailed." *U.S. ex rel. Lefan v. General Electric Co.*, 397 F.App'x. 144, 149 (6th Cir. 2010) (citation omitted).

IV. Argument

A. The Attorneys' Fees Submitted Are Reasonable And Should Be Awarded.

1. The Hours Expended by Name Seeker's Counsel are Reasonable. Per the Order, Name Seeker is entitled to "its attorneys' fees and costs reasonably incurred in seeking discovery and sanctions from AMG." (Dkt. 213 at 7.) Accordingly, Name Seeker attaches particularized billing record summaries for time billed by Name Seeker's counsel. (*See* Exs. B & C.) Manatt, Phelps & Phillips LLP ("Manatt"), has spent **290.6 hours** in seeking discovery and sanctions from AMG. (*See* Ex. B at 9; *see also* Ex. A at ¶¶ 12, 16.) Local counsel, McGlinchey Stafford PLLC ("McGlinchey"), spent **18.8 hours** assisting in those efforts. (*See* Ex. C; *see also* Sarkar Decl, Ex. D, at ¶¶ 5, 8-9.) The records submitted include time spent by Name Seeker's counsel on issues caused by or related to AMG's sanctionable conduct, including: (i) extrajudicial efforts to resolve disputes with AMG's counsel; (ii) efforts to investigate and uncover AMG's spoliation; (iii) moving for sanctions; (iv) preparing for and appearing at discovery conferences as well as negotiating and preparing resultant court orders; (v) preparing for and rescheduling depositions and other deadlines to accommodate AMG discovery disputes; (vi) defending AMG's motion to dismiss Name Seeker's crossclaims—an effort severely hampered by AMG's destruction of evidence; and (vii) preparing this fee application.[3]

Name Seeker submits that the number of hours billed by its counsel in relation to AMG's

[3] Time spent on such issues is generally compensable in this context. *See*, *e.g.*, Fed. R. Civ. P. 37(b)(2)(C) ("[T]he court *must* order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, *caused by the failure*" to comply with a court order) (emphasis added); *J.P. Morgan Chase Bank, N.A.*, 2007 WL 1875928, at *7 (fees incurred in "meet and confers" and during discovery conferences recoverable); *U.S. v. Elsass*, No. 2:10-cv-336, 2012 WL 4482982, at *4 (S.D. Ohio Sept. 26, 2012) ("time spent preparing and presenting a fee application is ordinarily compensable"); *Ross v. Choice Hotels Int'l, Inc.*, No. 2:10-CV-1098, 2012 WL 768200, at *2 (S.D. Ohio Mar. 7, 2012) (party awarded "expenses, including attorney's fees, incurred by them in connection with the filing and grant of their motion" for sanctions); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 647 (S.D. Tex. 2010) (party awarded "reasonable costs and attorneys' fees required to identify and respond to the spoliation" where plaintiff "spent considerable time and money attempting to determine the existence and extent of the spoliation, hampered by the defendants' inconsistent and untruthful answers to questions" regarding the existence of the destroyed evidence); *Lodge v. United Homes*, LLC, 787 F. Supp. 2d 247, 262 (E.D.N.Y. 2011) (fees where "Plaintiff was severely prejudiced by the [] Defendants' protracted and inexcusable disclosure and discovery violations by incurring unnecessary costs and fees in defending" motion to dismiss).

discovery misconduct is reasonable. Name Seeker's "Motion for Sanctions Against AMG Lead Source" (*see* Dkt. 190, the "Motion") lays out in detail the enormous difficulties Name Seeker encountered because of AMG's discovery abuses over the course of nearly 10 months. (*Id.* at 3-8.) AMG and Mr. Melber made repeated misrepresentations to Name Seeker and the Court regarding the existence of and their control over relevant electronically stored information, forcing Name Seeker's counsel to expend extraordinary amounts of time to investigate, uncover, and challenge AMG's obstruction of the discovery process. (*Id.*; Dkt 213 at 2-3; Dkt. 190-1, Exs. C-F & H-M thereto.)

Moreover, rather than simply admit fault in the face of overwhelming evidence, AMG wasted the Court's and Name Seeker's time by representing it would oppose the Motion and then, *one hour* before its deadline to do so was to expire, by deciding not to "further defend this action" and directing Mr. Melber to "take no further action on its behalf"—a tactic which thus far has deprived Name Seeker from learning the full extent of AMG's spoliation. (Dkt. 199 at ¶¶ 2, 3; *see also* Dkt. 201 at ¶ 4.) AMG's misdeeds also disrupted the entire case, forcing Name Seeker's counsel to spend an inordinate amount of time rescheduling depositions, preparing discovery orders, and securing various extensions to case management deadlines in order to resolve AMG-related issues. (*See*, *e.g.*, Dkt. 213 at 2-3.)

Altogether, AMG's unlawful behavior has created, multiplied, and amplified the need for unnecessary and time consuming litigation in this case, which supports a finding that the many hours spent by Name Seeker's counsel in combatting such behavior were reasonable. *See*, *e.g.*, *Swapalease, Inc. v. Sublease Exchange.com, Inc.*, No. 1:07-CV-45, 2009 WL 1119591, at *4 (S.D. Ohio Apr. 27, 2009) ("[I]t would be inequitable to not fully compensate the prevailing party for all of the additional expenses imposed on it by its counterpart's unreasonable and unjustified refusal to produce the discovery to which it is entitled.") (citations omitted); *Bendix Commercial Vehicle, Sys., LLC v. Haldex Brake Prod. Corp.*, No. 1:09 CV 176, 2011 WL 871413, at *1-4 (N.D. Ohio Mar. 1, 2011) (holding fees petitioner's rates and hours were reasonable under "lodestar" method where party opposing fee motion caused numerous procedural and discovery disputes as well as unnecessary motion practice).

2. The Rates Charged by Name Seeker's Counsel are Reasonable. To determine a reasonable hourly rate for "lodestar" purposes, the Sixth Circuit uses "as a [general] guideline the prevailing marketing rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Gonter v. Hunt Valve Co.*, Inc. 510 F.3d 610, 618 (6th Cir. 2007) (citation omitted). However, the Sixth Circuit "has also noted that out-of-town counsel with experience and knowledge regarding a client or a particular area of law may handle a matter more efficiently than local counsel, who would have to spend extra time to learn the facts and the law." *West v. AK Steel Corp. Ret. Accumulation Pension Plan*, 657 F. Supp. 2d 914, 934 (S.D. Ohio 2009) (citing *Graceland Fruit, Inc. v. KIC Chems.*, 320 F.App'x. 323, 329–330 (6th Cir. 2008). In other words, district courts may also "look to *national markets,* an area of specialization, *or any other market they believe is appropriate* to fairly compensate attorneys in individual cases." *McHugh v. Olympia Entertainment, Inc.*, 37 F. App'x 730, 740 (6th Cir. 2002) (emphasis added). Moreover, litigation counsels' "well-defined billing rates … can be used to help calculate a reasonable rate for a fee award" because "normal billing rates usually 'provide an efficient and fair short cut for determining the market rate.'" *Hadix v. Johnson*, 65 F.3d 532, 536 (6th Cir. 1995) (citations omitted).

Applying the foregoing principles to this case, it is clear that the rates charged by Name Seeker's counsel are reasonable. Manatt's Chicago-based counsel charges Name Seeker a "blended" rate of $460 per hour for this case, $305 per hour for a senior paralegal, and $285 per hour for one litigation support staff member who was involved in the forensic copying and analysis of the computers at issue. (Ex. A at ¶¶ 9, 11.) Of the attorneys, one (Richard Gottlieb) is a *Chambers*-listed senior Partner with over thirty years of experience in financial services litigation, while the other (Paul

Heeringa) is a Counsel with nearly 12 years of experience, and both focus on defending financial services clients in putative class actions and other complex litigation. (*Id.* at ¶¶ 5, 7.) Further, Messrs. Gottlieb and Heeringa have represented Name Seeker for roughly ten years and are charging below the standard rates for Manatt's lawyers, large nationally-renowned firms, and attorneys with comparable skills and experience concentrating in the same difficult area of law. (*Id.* at ¶¶ 4, 8-9, 12, 22; Ex. D at ¶ 10.)[4] Manatt's "blended" rate is also commensurate with what courts in this Circuit have found "reasonable" when using the "lodestar" method to calculate fees in other complex litigation cases.[5]

Local counsel's rate is also reasonable. McGlinchey, another large defense firm, charges Name Seeker a discounted rate of $350 per hour for one attorney, Richik Sarkar, a senior Partner. (Ex. A at ¶¶ 4, 6, 10, 17; Ex. D at ¶¶ 6-9.) Mr. Sarkar is likewise highly skilled, has over 18 years of experience, and is billing well below his usual hourly rate. (Ex. D at ¶¶ 6-7; Ex. A at ¶ 10.) And the rate Mr. Sarkar is charging Name Seeker here is commensurate with or below rates charged by similar large defense firms and lawyers with similar experience and skill practicing in Ohio. (Ex. D at ¶ 11; Ex. A at ¶ 22.)[6]

---

[4] Undoubtedly, the Fair Credit Reporting Act at the heart of this case, "particularly in the class action context, is a complex and challenging area of law." *White v. Experian Info. Sols.*, 993 F. Supp. 2d 1154, 1172 (C.D. Cal. 2014).

[5] *See, e.g.*, *Gilbert v. Abercrombie & Fitch*, Co., No. 2:15-CV-2854, 2016 WL 4159682, at *13-16 (S.D. Ohio Aug. 5, 2016), *report and recommendation adopted*, 2016 WL 4449709 (S.D. Ohio Aug. 24, 2016) (finding rates for out-of-state counsel reasonable despite exceeding the average hourly rates charged in Columbus because "it was reasonable for plaintiff to hire counsel from outside th[e] forum" under the circumstances and the rates charged were "consistent with the rates for similar services by lawyers of reasonably comparable skill, experience, and national reputation"); *Lowther v. AK Steel Corp.*, No. 1:11-CV-877, 2012 WL 6676131, at *4-5 (S.D. Ohio Dec. 21, 2012) (collecting "lodestar" cases finding reasonable rates as high as $500 per hour); *West*, 657 F. Supp. 2d at 934 ($425 hourly rate reasonable); *Zarwasch-Weiss v. SKF Economos USA, Inc.*, 838 F. Supp. 2d 654, 673 (N.D. Ohio 2012) (hourly rate ranging from $433.50 to $446.25 per hour for senior partner at large, multi-office law firm from Philadelphia was reasonable); *Swapalease, Inc.*, 2009 WL 1119591, *3-6 ($381 per hour for specialized, out-of-town patent lawyer was reasonable); *Torgeson v. Unum Life Ins. Co.*, No. C05-3052-MWB2007 WL 433540, at *5-7, (N.D. Iowa Feb. 5, 2007) (finding $425 per hour billing rate reasonable for specialized, Chicago-based lawyer).

[6] The Sixth Circuit has approved the use of state bar surveys to determine the reasonableness of an hourly rate, particularly for Ohio practitioners. *See, e.g., Gonter*, 510 F.3d at 619. The most recent Ohio State Bar Association survey was published roughly four years ago in 2013, and it reflects that hourly rates for firms with more than 50 attorneys like McGlinchey ranged from $345 to $625, while rates for firms with offices in downtown Columbus ranged from $203 to $510. *See* OSBA, *The Economics of Law Practice In Ohio in 2013,* at p. 39, *available at* https://www.ohiobar.org/NewsAndPublications/Documents/OSBA_EconOfLawPracticeOhio.pdf (last accessed Mar. 9, 2017). While McGlinchey does not have a Columbus office, the rate charged by the Mr. Sarkar in this case is easily within the Columbus range four years ago and appropriately closer to the upper end of that range given his experience.

B. Costs Submitted by Name Seeker are Reasonable and Should Be Awarded.

The Court also awarded Name Seeker its "costs reasonably incurred in seeking discovery and sanctions from AMG." (Dkt. 213 at 7.) Although the Sixth Circuit has apparently not yet established a reasonableness test in this context, district courts in this jurisdiction have relied on 28 U.S.C. § 1920 when awarding costs in connection with sanctions proceedings. *See*, *e.g.*, *Watkins & Son Pet Supplies v. Iams Co.*, 197 F. Supp. 2d 1030, 1036 (S.D. Ohio 2002); *Zarwasch-Weiss v. SKF Economos USA, Inc*., 838 F. Supp. 2d 654, 676 (N.D. Ohio 2012).[7] Courts elsewhere have held "[e]xpense shifting sanctions are defined as the 'reasonable expenses incurred' *in making or opposing the motion….*" *All. Indus., Inc. v. Longyear Holding, Inc*., No. 08CV490S, 2010 WL 3991636, at *5 (W.D.N.Y. Oct. 12, 2010) (quoting Moore's Federal Practice–Civil, § 37.23 [1] (2010)) (emphasis added).

Name Seeker incurred $2,925 in costs in the form of fees paid to its forensic expert, John Clingerman, who copied and analyzed the two electronic devices at issue, aided in Name Seeker's investigation of AMG's spoliation, and provided witness testimony in support of Name Seeker's Motion. (*See* Ex. A at ¶¶ 18-19; D4 LLC Invoice, Ex. E; and Clingerman Decl., Ex. F, at ¶¶ 4-6; *see also* Dkt. 190-19.) Name Seeker also incurred $16,938.22 in Westlaw research charges relating to seeking discovery and spoliation sanctions, preparing the Rule 502 claw back order, opposing AMG's motion to dismiss, and preparing this application. (Ex. A at ¶¶ 12, 20; Ex. G.) These costs were incurred as a direct result of AMG's discovery abuses and in furtherance of Name Seeker's efforts in seeking discovery and sanctions from AMG. Thus, they are reasonable and should be awarded in full.

[7] Under §1920, "[a] judge or clerk of any court of the United States may tax as costs" among other things (i) "fees and disbursements for printing and witnesses" and (ii) "fees for explication and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." On its face, §1920 is not limited to hearings or trial and, as to the Motion for Sanctions, Name Seeker is the prevailing party. Moreover, while §1920 does not include "research" costs explicitly, this is akin to copies and Westlaw charges are typically compensable under Rule 37. *See, e.g.*, *Burket v. Hyman Lippitt, P.C.*, No. CIV.A. 05-72110, 2008 WL 597278, at *1-2 (E.D. Mich. Mar. 3, 2008).

C. The Court Should Likewise Hold AMG's Officers Responsible for the Award.

Name Seeker suspects that AMG's flippant attitude toward discovery stems from a belief that AMG, which is allegedly no longer in operation, is effectively judgment proof because it has no assets with which to pay. Even if that were true (and there has been no discovery showing that it is), AMG's principals can, and indeed should, be held personally liable for the sanctions awarded to Name Seeker.

It is well-accepted that a court need not "pierce the corporate veil" to hold individual corporate officers liable for the corporation's sanctionable or contemptuous misconduct, particularly where, as here, the officers' participation in that misconduct provides a basis for imposing individual sanctions. *See, e.g.*, *Elec. Workers Pension Trust Fund of Local Union |58, IBEW v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 386 (6th Cir. 2003); *Johnson v. Kakvand*, 192 F.3d 656, 661-62 (7th Cir. 1999); *Anchondo v. Anderson, Crenshaw, & Assocs., L.L.C.*, No. CV 08-0202 RB/WPL, 2010 WL 2517167, at *2 (D.N.M. June 18, 2010). In this case, the undisputed facts show that Don Marasco—one of the only two AMG employees—or at least someone using his user profile intentionally destroyed relevant, electronically stored data in direct contravention to this Court's discovery orders and the Federal Rules of Civil Procedure. (*See* Dkt. 190 at 8, 12; *see also* Dkt. 190-19 at ¶¶ 21-22; Dkt. 213 at 4.) Thus, at the minimum, Mr. Marasco and/or the other AMG principal (*i.e.*, Sam DeJohn who would be the only other person to have the motive and opportunity to destroy the data) should be held personally responsible for their respective participation in AMG's discovery fraud and required to pay.

D. AMG's Counsel Should Be Jointly and Severally Responsible for the Award.

Finally, under similar circumstances, district courts including this one have routinely ordered that parties and their attorneys must jointly and severally pay fees and expenses awarded as sanctions, especially where counsel failed to ensure that the destroyed evidence was adequately preserved. *See, e.g.*, *DiLuzio v. Vill. of Yorkville, Ohio*, No. 2:11-CV-1102, 2016 WL 7406535, at *38-40 (S.D. Ohio Dec. 22, 2016), *report and recommendation adopted*, 2017 WL 780605 (S.D. Ohio Feb. 28, 2017);

Brown v. Tellermate Holdings Ltd., No. 2:11-CV-1122, 2014 WL 2987051, at *19-26 (S.D. Ohio July 1, 2014), *adopted as modified*, 2015 WL 4742686 (S.D. Ohio Aug. 11, 2015).[8] Such is the case here.

This Court's recent opinions in *DiLuzio* and *Tellermate* are instructive on this point. In *DiLuzio*, the plaintiff moved sanctions alleging that the defendants had intentionally destroyed documents. Granting the motion, the Court first noted that litigation "counsel has an 'affirmative obligation to speak with the key players' to 'preserve ... the sources of discoverable information.'" 2016 WL 7406535 at *38 (quoting *Tellermate*, 2014 WL 2987051, at *19-20). However, because "defense counsel took little or no action to prevent the disappearance of [the] documents" and failed to "cooperate and be transparent about how information could be retrieved," the Court ruled that "defense counsel [had effectively] assisted his clients' efforts to thwart discovery" and ordered that "counsel pay jointly and severally with his clients for the reasonable attorneys' fees and costs incur[ed] in connection" with the sanctions motion. *Id.* at *39 (citing *Tellermate*, 2014 WL 2987051, at *1, 4, 26).

Ruling on a similar motion in *Tellermate*, the Court found that defense "counsel fell far short of their obligation to examine critically the information which [his client] gave them about the existence and availability of documents requested by" the plaintiffs. 2014 WL 2987051, at *1. The Court also found that the defendant, "with the participation of its counsel, either intentionally or inadvertently failed to fulfill certain of its discovery obligations [including the duty to preserve relevant evidence],

[8] *See also HM Elecs., Inc. v. R.F. Techs., Inc.*, No. 12CV2884-BAS-MDD, 2015 WL 4714908, at *21, 31 (S.D. Cal. Aug. 7, 2015), *vacated in part by*, 171 F. Supp. 3d 1020 (S.D. Cal. 2016) (awarding monetary sanctions where attorney engaged in sanctionable discovery practices by, *inter alia*, not crafting and implementing a litigation hold and not otherwise communicating to his clients the important of preserving relevant documents); *Clear-View Techs., Inc. v. Rasnick*, No. 5:13-CV-02744-BLF, 2015 WL 2251005, at *8 (N.D. Cal. May 13, 2015) ("Defendants and their prior counsel [held] jointly and severally liable for [$212,320.91 in fees], which the court f[ound] reasonable in light of the extraordinary effort required to uncover th[eir] widespread [discovery] abuse."); *Dorchester Fin. Holdings Corp. v. Banco BRJ*, S.A., No. 11-CV-1529 KMW KNF, 2015 WL 1062327, at *2-3 (S.D.N.Y. Mar. 3, 2015) (client and attorney jointly and severally liable for $68,987.50" for time expended by defendant in connection with sanctions motion); *Ryan v. Staten Island Univ. Hosp.*, No. 04-CV-2666, 2006 WL 3497875, at *8-9 (E.D.N.Y. Dec. 5, 2006) (attorney required, *without assistance from client*, to pay cost of motion for sanctions); *In re Sept. 11th Liability Ins. Coverage Cases,* 243 F.R.D. 114, 132 (S.D.N.Y. 2007) (party and law firm sanctioned a total of $1,250,000 under Rules 11 and 37); *E. & J. Gallo Winery v. EnCana Energy Servs., Inc.*, No. CVF03-5412AWI LJO, 2005 WL 3710352, at *2, 8 (E.D. Cal. Aug. 15, 2005) (approving $102,078.97 sanction levied against law firm).

leading to a cascade of unproductive discovery conferences, improperly-opposed discovery motions, and significant delay and obstruction of the discovery process" that were "accompanied by counsel's repeated and unequivocal statements about crucial facts concerning the discovery process—statements which, for the most part, turned out simply to be untrue." *Id.* at *2. And counsel's failures "had the effect of hampering the [plaintiffs'] ability to pursue discovery in a timely and cost-efficient manner." *Id*. Thus, the Court held the defendant and its counsel jointly responsible for the sanctions. *Id*. at *26.

Like the counsel in *DiLuzio* and *Tellermate*, Mr. Melber failed to ensure that AMG preserved relevant evidence that his clients intentionally destroyed in this case. Indeed, on August 16, 2016, the parties jointly submitted a proposed agreed order to the Court regarding the production of certain electronic evidence. (*See* Dkt. 174.) Later that same day, the Court entered that order, which required AMG to "produce [a] laptop that it has identified and represented was used by AMG personnel during the relevant time period in this case *and that is presently in the possession of AMG's counsel* … to Name Seeker for inspection and copying" and that the laptop "be preserved and maintained *by AMG's counsel and not destroyed or altered in any way,* in accordance with applicable law and rules." (Dkt. 175 at ¶ 4, emphasis added). Yet, the undisputed facts show that, **just one day after** Mr. Melber agreed to and the Court entered the foregoing order, someone (likely Don Marasco) ran an anti-forensic software on the laptop prior to its production to Name Seeker, wiping it clean of data. (*See* Dkt. 190 at 7-8.) If the laptop was truly in Mr. Melber's possession, this should not have happened. If it was not, then Mr. Melber did not comply with the Court's order and failed to preserve and maintain the laptop.

Compounding the problem, Mr. Melber then made several unequivocal representations to the Court and Name Seeker as to the whereabouts of the data deleted from the laptop—*i.e.*, suggesting that the data (i) had been transferred to a "thumb drive" which, come to find out, had also been wiped of relevant evidence prior to its production to Name Seeker, or (ii) would be recoverable through forensic analysis, which likewise proved not to be true. (*Id.* at 6-8, 10.) And like in *Tellermate*, Mr. Melber's false statements resulted in a torrent of unproductive negotiations and court conferences, a lengthy sanctions motion which Mr. Melber initially advised was opposed but ultimately was not, and overall a major delay and obstruction of the discovery process. Thus, the Court should rule similarly here.

In sum, if the laptop and thumb drive were tampered with by anyone while those devices were in Mr. Melber's possession, the only logical conclusions to be drawn are that Mr. Melber either (i) was directly or indirectly complicit in that misconduct, or (ii) at the very least, turned a blind eye while someone else destroyed evidence that was *supposed to be preserved by Mr. Melber* per the Court's orders, knowing full well that Name Seeker had requested copies. Either way, Mr. Melber failed to take any meaningful steps to prevent AMG's willful destruction of evidence in this case, thus effectively helping AMG thwart Name Seeker's efforts to obtain discovery. Consequently, Mr. Melber should be held jointly and severally responsible for the fees and costs awarded to Name Seeker.

V. Conclusion

For all the reasons stated above and in the accompanying exhibits, Name Seeker respectfully requests that the Court enter an order: (1) finding that the fees charged and the hours expended by Name Seeker's counsel in seeking discovery and sanctions from AMG were reasonable; (2) awarding total attorneys' fees in the amount of $136,503.00 and costs in the amount of $19,863.22; (3) holding AMG, its principals (*i.e.*, Messrs. Marasco and DeJohn), and Mr. Melber jointly and severally reasonable for paying said awards; and (4) granting all other relief the Court deems just and proper.[9]

[9] Per the Order, the Court reserved its ruling on Name Seeker's request for a default judgment against AMG on its crossclaims, preferring to "await the outcome of [then-pending, Court-ordered additional] discovery [from AMG] to see if, in fact, some o[r] all of the prejudice from AMG's willful conduct can be cured." (Dkt. 213 at 5, discussing Dkt. 212.) Name Seeker advises the Court that said anticipated additional discovery, which was due on March 3, 2017 (*see* Dkt. 212), was woefully inadequate in that AMG once again failed to respond or provide any discovery by the Court's *agreed* discovery order. (*See* Correspondence from P. Heeringa to B. Melber, Ex. H.) Name Seeker will seek the Court's guidance under separate cover and reserves all rights in this regard. Further, Name Seeker has also provided various reference materials regarding fees for the Court's consideration. (*See* Ex. I.) These materials show that the fees by Name Seeker's counsel are within or below comparable ranges. (*See* Ex. A at ¶ 22.)

Dated: March 10, 2017

Respectfully Submitted,

/s/ A. Paul Heeringa

Richard Eric Gottlieb (admitted *pro hac vice)*
A. Paul Heeringa (admitted *pro hac vice)*
MANATT, PHELPS & PHILLIPS, LLP
115 S. LaSalle Street, Suite 2600
Chicago, IL 60603
Phone: (312) 626-1813
Fax: (312) 648-6202
rgottlieb@manatt.com
pheeringa@manatt.com

Richik Sarkar
MCGLINCHEY STAFFORD PLLC
2550 Chagrin Blvd., Suite 406
Cleveland, OH 44122
Phone: (216) 378-4994
Fax: (216) 378-9910
rsarkar@mcglinchey.com

Attorneys for Defendant, Name Seeker, Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on March 10, 2017, the foregoing document was filed electronically along with all supporting exhibits and materials referenced therein. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic docket.

/s/ *A. Paul Heeringa*

A. Paul Heeringa

318342342.4